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No. 92-1316

In The

Supreme Court of the United States

October 1992 Term

NELSON R. RABY, *et al*,

Petitioners,

v.

M/V PINE FOREST, *et al*,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit Civil Appeal Nos. 90-35618, 90-35879, 91-35375

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE IN SUPPORT OF THE PETITIONERS

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Seafarer and International House of New York
Seamen's Mission of Chicago
Stella Maris Maritime Center of New Orleans,
New Orleans Baptist Seamen's Center,
Brunswick Port Society d/b/a/
International Seaman's House
Tacoma Seamen's Center, and the
International Transport Workers' Federation

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The Apostleship of the Sea, National Catholic Conference for Seafarers, The North American Maritime Ministry Association, the Seamen's Church Institute of Florida, New England Seamen's Mission, Beaumont International Seamen's Center, Bay Area Seafarers' Services/International Maritime Center, Seafarer and International House of New York, Seamen's Mission of Chicago, Stella Maris Maritime Center of New Orleans, New Orleans Baptist

Seamen's Center, Brunswick Port Society d/b/a International Seamen's House, Tacoma Seamen's Center, and the International Transport Workers' Federation respectfully move this Court for leave to file the accompanying amicus curiae brief in support of Nelson R. Raby and the other petitioners pursuant to Supreme Court Rule No. 37 urging this Court to grant the petition for certiorari.

Consent has been withheld by counsel for respondents, requiring the filing of this motion.

The Apostleship of the Sea is the official outreach ministry of the Catholic Church to seafarers and all who work or travel on the High Seas. The Apostleship of the Sea supervises 64 designated port chaplains and hundreds of lay workers of the Catholic Church at 53 ports in the United States of America. The National Catholic Conference for Seafarers is a voluntary association of Catholic seafarers and port ministries acting as an auxiliary to assist the Apostleship of the Sea. The North American Maritime Ministry Association is a voluntary association of port ministries consisting of Catholic, Orthodox and Protestant, including Lutheran, Anglican, Presbyterian, United Methodist, American and Southern Baptist, and many others working together to minister to seafarers of all faiths.

The Seamen's Church Institute of Florida, New England Seamen's Mission, Beaumont International Seamen's Center, Bay Area Seafarers' Services/International Maritime Center, Seafarer and International House of New York, Seamen's Mission of Chicago, Stella Maris Maritime Center of New Orleans, New Orleans Baptist Seamen's

Center, Brunswick Port Society d/b/a International Seamen's House, and the Tacoma Seamen's Center are non-profit, tax exempt entities organized under the laws of various states for the purposes of rendering services to seafarers calling at United States ports. Each of these port ministries is affiliated with a recognized religious group. Each ministry is ecumenical and ministers to seafarers of all faiths and nationalities. There are over 100 port ministries in the United States, of which the above named port ministries are only a few. Each of the port ministries, chaplains, both lay and ordain, visit seafarers on ships, and, when possible, welcome the seafarers to seafarers' clubs where they can relax, telephone home, mail letters, and recover their sense of dignity and community. The great majority of seafarers welcomed to United States ports by port ministries are foreign seamen-less than 3% are United States citizens. Foreign seamen, far away from their homes and family support, frequently request assistance regarding their working conditions and entitlement to wages.

The International Transport Workers' Federation is a labor secretariat based in London, England. Its membership consists of over 450 unions around the world that are engaged in transportation services. Membership of the affiliates comprising the International Transport Workers' Federation is over 4,000,000 individuals. Numerous North American maritime unions are affiliates of the International Transport Workers' Federation, including the National Maritime Union, the Seamen's International Union, the Masters, Mates and Pilots Association, and others.

The Ninth Circuit Court of Appeals has ruled in this litigation that truth is an absolute defense to the maritime tort of blacklisting, regardless of the shipowner's motive or intent and whether or not the truthful statements were made in retaliation for the seaman requesting his wages that were lawfully due.

The decision of the Ninth Circuit Court of Appeals in this litigation significantly impacts the ability of the maritime port ministries to advise seamen about the protection available under the Seaman's Wage Act and the seaman's entitlement to his wages without suffering retaliatory action by the shipowner. The present opinion requires a seaman to forego his right to future employment by being blacklisted with no recourse under the general maritime law. Movers submit that a shipowner should not, as a matter of law, be entitled to intimidate and coerce a seaman by truthfully telling him that he will be blacklisted and never work again if he demands his lawful wages, and then in fact blacklist the seaman with immunity when the seaman does demand his wages.

The International Transport Workers' Federation believes that a review of this matter is necessary because the opinion of the Ninth Circuit Court of Appeals is in direct conflict with the policy underlying the Seaman's Wage Act, and further that the opinion encourages foreign shipowners to circumvent their contractual obligations validly entered into with the seamen, frequently including ITF approved agreements.

The opinion of the Ninth Circuit Court of Appeals prevents the seamen from enjoying the benefits of an ITF

collective bargaining agreement incorporating the shipping articles. Seamen will not demand their wages if they are required to forego future employment as merchant seamen to obtain what is plainly theirs – namely the wages set forth in the shipping articles.

For the foregoing reasons, Amici request that their motion to file the annexed brief amicus curiae be granted.

Dated this 4 day of March, 1993.

Respectfully submitted:

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BRIEF AMICUS CURIAE IN SUPPORT OF THE PETITIONERS

INTEREST OF AMICI CURIAE

The interest of Amici, the Apostleship of the Sea, National Catholic Conference for Seafarers, The North American Maritime Ministry Association, the Seamen's Church Institute of Florida, New England Seamen's Mission, Beaumont International Seamen's Center, Bay Area Seafarers' Services/International Maritime Center, Seafarer and International House of New York, Seamen's Mission of Chicago, Stella Maris Maritime Center of New Orleans, New Orleans Baptist Seamen's Center, Brunswick Port Society d/b/a/ International Seamen's House, Tacoma Seamen's Center, and the International

Transport Workers' Federation, is set forth in the preceding motion for leave to file this brief.

STATEMENT OF THE CASE

Defendants, Inui Steamship Co., Ltd., and Delica Shipping, S.A., owners of the M/V Pine Forest, Systematically cheated the Philippine crewmembers out of their wages set forth in the shipping articles. The shipowner required the seamen to sign two sets of wage records each month – one for the lower amount actually received each month and another receipt falsely indicating that the plaintiffs had received the wages provided in the shipping articles.

Plaintiffs, thirteen Filipino seamen, sued for their back wages and penalty wages pursuant to the Seaman's Wage Act, 46 U.S.C. § 10313. The shipowner partially paid the back wages and then signed the seamen off the shipping articles, making notations in each Seaman's Book that rendered plaintiffs unemployable as merchant seamen. The trial court found that defendants made the notations as "retaliation and punishment of the plaintiffs for requesting what they were lawfully entitled to – their wages" and awarded compensatory and punitive damages. The Ninth Circuit Court of Appeals reversed holding that the truthfulness of the notations was an absolute defense to plaintiffs' claims for blacklisting. The Ninth Circuit further reversed the trial court's award of penalties under the Seaman's Wage Act holding that either cargo or a seaman must be discharged in a United States

port and further requiring the completion of a voyage as a condition precedent to a claim for statutory penalties.

Amici respectfully represent that the ruling by the Ninth Circuit is contrary to both the general maritime law and the express provisions and underlying purpose of the Seaman's Wage Act.

SUMMARY OF ARGUMENT

This Court has repeatedly stated that seamen are wards of the court and thus entitled to special protection from abusive employment practices. The Seaman's Wage Act must be liberally construed in favor of seamen to effectuate the remedial purpose of the Act. *Ibrandsten Co., Inc. v. Johnson,* 343 U.S. 779 (1952). Courts interpreting the Act must construe its provisions in such a manner as to compel a recalcitrant employer to promptly and honestly pay a seaman his earned wages. *Ibrandsten Co., Inc. v. Johnson, supra; Griffin v. Oceanic Contractors, Inc.,* 458 U.S. 564 (1982). Any decision by a court which fails to interpret the Act in a manner which effectuates its purpose erodes the policies underlying the Act and ignores the previous rulings of this Court.

The policy underlying the Wage Act requires the courts to protect the class of persons which the Act is designed to benefit. The general maritime tort of blacklisting serves the purpose of protecting a seaman who asserts his rights under federal law from retaliation and reprisal by an employer. *See, e.g., Carroll v. Protection Maritime Ins. Co., Ltd.* 512 F.2d 4 (1st Cir. 1975); *Pino v. Protection Maritime Ins. Co., Ltd.,* 599 F.2d 10 (1st Cir.

1979), *cert. denied* 444 U.S. 900 (1979); *Smith v. Atlas Offshore Boat Service, Inc.*, 653 F.2d 1057 (5th Cir. 1981). The Ninth Circuit relied exclusively upon the Restatement, Second of Torts to conclude that truth was an absolute defense to the tort of blacklisting. The decision of the Ninth Circuit thus undermines the policy of the Seaman's Wage Act and effectively prevents a seaman from enforcing his rights under federal law.

REASONS FOR GRANTING CERTIORARI

I. THE PETITION FOR CERTIORARI RAISES SIGNIFICANT NATIONAL ISSUES OF LAW REGARDING THE PROPER INTERPRETATION OF THE SEAMAN'S WAGE ACT

The maritime industry has long been tarnished by a history of abusive employment practices.[1] In response to deceptive practices concerning the payment of seamen's wages, Congress first enacted the Seaman's Wage Act in 1790. This legislation was clearly remedial in nature, and intended to improve the lot of seafarers worldwide. In 1983 Congress again revisited this problem area and reenacted the Act without intending any substantive changes to the protections afforded under federal law.

The Seaman's Wage Act 46 U.S.C. § 10313 seeks to establish a uniform framework for the regulation of employment conditions for seafarers. Whenever a foreign vessel is within the harbors of the United States, the Act

[1] See Norris, *The Law of Seamen*, Ch. 12, Ch. 17 (4th ed. 1985); Chapman, *Trouble on Board*, pp. 37-73 (Cornell University 1992).

specifically regulates the employer-employee relationship which exists between foreign shipowners and foreign seamen. *Strathearn S.S. Co. v. Dillon*, 252 U.S. 348 (1920). The entry of a foreign vessel into United States territorial waters mandates the application of the Wage Act, and therefore, requires the shipowner to conform its conduct regarding payment of the crew with the provisions of the Act.

The case before this Court represents a purposeful attempt by a foreign shipowner to circumvent the application of United States law, namely the Seaman's Wage Act. As discussed more fully in the petition for certiorari, the defendants systematically engaged in a scheme to underpay the seamen by maintaining two sets of wage records. One set of wage records reflecting the wages actually paid to the seamen, and the second set of records falsely indicating that the seamen were being paid the wages mandated under their contracts of employment.

This Court has long held that the Wage Act must be broadly and liberally interpreted in favor of the seaman. *Ibrandsten Co., Inc. v. Johnson*, 343 U.S. 779 (1951). The essential elements for application of the protections of the Wage Act were last discussed by this Court in *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564 (1982). In *Griffin* this Court noted that the lower courts were divided in their interpretation of the Act, and that many had failed in their duty to faithfully interpret the Wage Act consistent with its intended remedial purpose. The opinion of the Ninth Circuit significantly undermines the protections afforded foreign seamen under the Wage Act, and thus is completely contrary to the previous decision of this Court in *Griffin*.

The opinion of the Ninth Circuit adds several new conditions for the application of the Wage Act. The decision below adds the requirement that cargo be discharged in the United States prior to invoking the Act's protections. In addition, the Ninth Circuit's decision would require the completion of a voyage as a condition precedent to a claim for statutory penalties. In *Griffin v. Oceanic Contractors, Inc., supra,* this Court stated that only two conditions must be satisfied for an award of double wages. This Court held that first a master or owner must have failed to pay the seaman within the time allowed under the Act, and, secondly that this failure must be without sufficient cause. The Ninth Circuit's decision is thus in conflict with the previous decision of this Court in *Griffin* and that of the Eleventh Circuit which do not interpret the Act as having a voyage requirement. *See, Chung Yong Il v. Overseas Navigation Co.,* 774 F.2d 1043 (11th Cir. 1983), *cert. denied* 474 U.S. 1177 (1986) (White, J., dissenting from denial of certiorari).

The previous decisions of this Court provided a seaman with a simple, definite and reasonable procedure by which he might recover double pay where his wages are unreasonably withheld. *See McCrea v. United States,* 294 U.S. 23 (1935). The simple procedure envisioned by the Wage Act is now greatly undermined. The Ninth Circuit has added the requirement that there be a discharge of cargo and the completion of a seaman's employment obligation to the shipowner. No such conditions were required by this Court in *Griffin v. Oceanic Contractors, Inc., supra.* The Ninth Circuit clearly erred by so holding in this case.

II. BLACKLISTING IS A MARITIME TORT AND TRUTH OF STATEMENTS MADE IN RETALIATION IS NOT AN ABSOLUTE DEFENSE.

To achieve the remedial purpose of the Wage Act, a seaman must be free to actively pursue his claim without fear of retaliation or reprisal from his recalcitrant employer. Immediately following the institution of this claim for wages, the defendants herein took steps designed to 'blacklist' all of the plaintiffs-seamen. Through the use of notations in each plaintiff's seaman's book, the defendants began the process of insuring that all of the plaintiffs would be prevented from future employment as merchant seamen.

The employment process for Filipino seamen requires the applicant to submit his seaman's book to the prospective employer so that employer can review any notations made in the book. In this case, the notations in each plaintiff's books as well as other such similar efforts by the defendants, effectively prevented their employment as merchant seamen. The Ninth Circuit reversed the trial court's award of damages for the plaintiffs' loss of future income based upon its conclusion that truth was an absolute defense to the tort of blacklisting. The opinion relied exclusively upon the Restatement, Second of Torts, § 772, for support of this conclusion.

This blind reliance on the Restatement as the exclusive authority concerning the tort of blacklisting in admiralty cases is not supported by prior admiralty jurisprudence. The opinion of the Ninth Circuit fails to consider the effect of the truth defense on the ability of a

seaman to assert a claim for wages under the Wage Act. The remedial purpose of the Wage Act is completely destroyed by a rule of law which allows a member of a protected class to be punished for merely asserting his rights under federal law.

It is evidence that no seaman will seek the protections of the Wage Act if he must therefore sacrifice his future employment in the merchant marine. The protections provided by the maritime law certainly include the right to be free from retaliation and reprisal from a dishonest employer following the seaman's invocation of federal statutory rights. *See, e.g., Carroll v. Protection Maritime Ins. Co., Ltd.*, 512 F.2d 4 (1st Cir. 1975); *Pino v. Protection Maritime Ins. Co., Ltd.*, 599 F.2d 10 (1st Cir. 1979), *cert. denied* 444 U.S. 900 (1979); *Smith v. Atlas Offshore Boat Service, Inc.*, 653 F.2d 1057 (5th Cir. 1981). The Ninth Circuit's opinion is thus completely contrary to the decisions of both the First and Fifth Circuit, and represents an intolerable erosion of the protections of the Wage Act itself.

CONCLUSION

Accordingly, for the foregoing reasons, the Amici Curiae respectfully submit that the Petition for Certiorari should be granted, that briefing on the merits should be

ordered and that the matter should be thereafter set for argument to the Court.

Dated this 4 day of March, 1993.

Respectfully submitted:

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